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92-1863

Supreme Court, U.S.
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UNITED STATES SUPREME COURT

LOUIS J. ALIOTA and PAULETTE ALIOTA,
Petitioners

v.

JACK D. GRAHAM, WILLIAM D. SHOEMAKE,
KATHRYN FOWELLS, JANET WELLS, JOYCE BALL
UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
CASE Nos. 91-3757 and 92-3020

PETITION FOR WRIT OF CERTIORARI OF APPELLEES, LOUIS J. ALIOTA and PAULETTE ALIOTA

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. §2679(d)(2) unconstitutionally expands the jurisdiction of the Federal Courts beyond the jurisdictional limits imposed by Article III, Section 2 of the United States Constitution by expanding the jurisdiction of Federal courts to include cases not within the purview of that Constitutional provision?

2. Whether 28 U.S.C. §2679(d)(2) constitutes a violation of the Doctrine of Separation of Powers by vesting in the executive branch unfettered power to extend the jurisdiction of the Federal Courts to employees of the Federal Government who were not acting on behalf of the government at the time they comitted the tortious acts complained of by Plaintiffs?

3. Whether the panel decision of the Court of Appeals for the Third Circuit misapprehends the intent of 28 U.S.C. §2679(d)(2), in that, in the event of a determination that the defendants were not engaged in the course of their employment at the time of the conduct complained of, jurisdiction of this case, a common law tort action between citizens of the same state implicating no federal statute or treaty, is to be retained by the Federal District Court?

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II. OPINIONS OF OTHER COURTS

The United States District Court for the Western District of Pennsylvania, per Chief Judge Maurice B. Cohill, Jr., filed a memorandum opinion and order dated August 30, 1991, which granted the Plaintiffs' Supplemental Motion for Remand and to Strike Substitution of the United States as a defendant and remanded the case to State Court. This opinion has not been reported.

The United States Court of Appeals for the Third Circuit, per Circuit Judge Alito, filed an opinion dated January 22, 1993, which vacated the decision of the District Court and remanded the case for a redetermination of the scope of employment issue. This opinion is reported at ____ F.2d ____ (3d Cir., 1993)

III. STATEMENT OF JURISDICTION

The Petitioners, Louis J. Aliota, and Paulette Aliota, seek this Honorable Court's review of the judgment rendered by the Court of Appeals for the Third Circuit on January 22, 1993. The Petitioners filed a timely Petition For Rehearing In Banc, which was subsequently denied by Court Order dated February 18, 1993. This Honorable Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. §1254.

The Constitutional Provision and Statute involved in this case are Article III, Section 2 and 28 U.S.C. §2679(d)(2), respectively.

Article III, Section 2 of the United States Constitution provides:

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or what shall be made under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controver-

> sies between two or more states; - between citizens of different states - [and] between citizens of the same state claiming lands under grants of different states.

The statutory provision at issue, 28 U.S.C. §2679(d)(2), states as follows:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a state court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the attorney general shall conclusively establish scope of office or employment for purposes of removal.

IV. STATEMENT OF THE CASE

This case originated as a common law tort action filed by the Plaintiffs, Louis J. Aliota and Paulette Aliota, in the Court of Common Pleas for Erie County, Pennsylvania against five individual defendants who were employees of the Veteran's Affairs Medical Center in Erie, Pennsylvania. The action for defamation was commenced in State Court by the filing of a Writ of Summons in accordance with state law. Prior to the filing of a complaint, the action was removed to the United States District Court for the Western District of Pennsylvania upon the United States Attorney's Certification pursuant to 28 U.S.C. §2679(d)(2) that the five defendants were acting within the scope of their federal employment at the time of the alleged tortious conduct. Subsequent to the removal, the District Court ordered the filing of an amended complaint. Thereafter, the United States filed a Notice of Substitution and order dismissing the individual defendants. That order was entered by the Court without opportunity for the Plaintiffs to object.

The Plaintiffs moved pursuant to the authority of *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990) for a hearing regarding the scope of employment issue. In response, the District Court ordered the taking of depositions and the submissions of brief limited to that issue. Upon examining the resultant factual record on August 30, 1991, the District Court, per Maurice B. Cohill, Chief Judge, filed a memorandum opinion and order striking the substitution of the United States as party defendant and remanding the case to state court. The United States filed a Motion to Stay Remand to State Court which was denied by the District Court. The United States filed an appeal to the Court of Appeals for the Third Circuit. The Plaintiffs/Appellees filed a Motion to Quash Appeal to which the Defendants/Appellants filed a response. The Motion to Quash was denied by the Court of Appeals for the Third Circuit and argument was heard on June 25, 1992.

On January 22, 1993, the Court of Appeals for the Third Circuit issued an opinion, per Circuit Judge Alito, which vacated the decision of the District Court and remanded the case for a redetermination whether, in accordance with the procedures and standards set out in the opinion, the originally named individual defendants were acting within the scope of their employment when they allegedly made the defamatory statements. The Court of Appeals for the Third Circuit also held that the Attorney General's certification is conclusive, notwithstanding the potential determination that the defendants were not acting in furtherance of their Federal duties in committing the tort, and that, whatever determination was made by the District Court after full hearing, the case would remain for trial in the Federal Court.

The Plaintiffs/Appellees then filed a timely Petition for Rehearing In Banc before the Court of Appeals for the Third Circuit. In that petition, the same issues that are raised in the instant petition were set forth as well as the argument that the factual findings rendered by the District Court below were reviewable only under the "clearly erroneous" standard of F.R.C.P. 52(a) and that said findings had ample support in the record before the District Court and thus were not clearly erroneous.

V. ARGUMENT

A. THE PANEL DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, A DECISION OF THIS COURT, AND ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION.

The Third Circuit concluded:

> We conclude that when a tort suit against a federal employee is filed in State Court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the District Court has no authority to remand the case on the ground that the Attorney General's certification is erroneous.
>
> Slip opinion, p. 13.

The panel decision based this conclusion on the language of 28 U.S.C. §2679(D)(2) which states that the Attorney General's certification "shall *conclusively* establish scope of office or employment *for purposes of removal*" (emphasis in opinion). The panel decision further found support in the Third Circuit's decision in *Melo v Hafer*, 912 F.2d 628, 641, setting forth in its opinion (slip opinion, 14) "In that case we held that 28 U.S.C. §2679(d)(2) (1988) does not preclude a district court from resubstituting the original Defendants *for the purpose of trial* if the court concludes after removal that the Attorney General's certification was incorrect." The language of the panel opinion contradicts that court's clear statement in footnote 20, 912 F.2nd at 642, that the district court *must* determine whether the federal employee who was not acting within the scope of his employment may yet have acted under color of his office, providing removal jurisdiction under 28 U.S.C. §1442(a)(1) and adding "the point is relevant to the motion for remand, on which the district court must rule if it determines that West was not acting within the scope of his employment." 912 F.2d at 642, fn.20 The court went on to question whether the district court would have jurisdiction over any of the state law claims included in the federal action filed against Assistant U.S. Attorney West in the absence of some basis for federal jurisdiction.

The Third Circuit's statement in *Melo, supra*, is consistent with the decision of this Court in *Mesa v. California*, 489 U.S. 121 (1989). *Mesa* concerned removal jurisdiction under 28 U.S.C. § 1442(a), and noted that a statute which permits removal [on the basis of Federal employment] of *any* lawsuit filed against a federal employee would be unconstitutional. 489 U.S. at 136-139. The provision relied upon by the panel in this case is just that statute. Although, in its original brief, the Government asserted that the Attorney General's scope certification somehow distinguishes 28 U.S.C. § 2679(d)(2) from a statute which would permit removal only on the basis of employment status, the Government, and the Third Circuit, overlooked the fact that this interpretation of the *Westfall* Act would only narrow the removal jurisdiction, confining it to federal employees who are in the favor of the local U.S. Attorney. As the First Circuit aptly noted in *Nasuti v. Scannell, supra*, "[I]t is hard to imagine Congress empowering an executive officer ... to displace the federal court as the final determiner of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court." 906 F.2d at 812. That court went on to note that the Attorney General was under no constraint to be impartial in his determination or even to conduct an inquiry into the facts underlying the claim. Although these statements were made in the context of review of the scope certification, they apply equally to removal jurisdiction under 28 U.S.C. § 1442(a), which this court clearly left to the determination of the district courts in its decision in *Melo, supra*.

B. THE THIRD CIRCUIT'S INTERPRETATION OF 28 U.S.C.§2679(d)(2) EXPANDS THE JURISDICTION OF THE FEDERAL COURTS BEYOND THE CONFINES OF ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Article III, Section 2 of the United States Constitution provides:

> **Section. 2.** the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

> Laws of the United States, and Treaties made, or what shall be made under their Authority; - to all Cases affecting Ambassadors other public Ministers and Consuls; - to all cases of admiralty and maritime Jurisdiction; - to controversies to which the United States shall be a Party; - to Controversies between two or more states; - between Citizens of different States - [and] between Citizens of the same State claiming Lands under Grants of different States.

... "Congress cannot confer on lower federal courts a jurisdiction beyond the cases to which the judicial power of the United States extends under the Constitution. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No.25, A.F.L. v. W.L. Mead, Inc.*, 230 F.2nd 576 (1st Cir., 1956), *certiorari dismissed* 77 S.Ct. 21, 352 U.S. 802, 1 L.Ed. 2d 37. The basis for removal and substitution arises from an enactment of Congress, one of the "laws of the United States," the Federal Tort Claims Act, which provides for sovereign immunity of the United States and immunity for its employees *only* while engaged in the scope of their employment in furtherance of the business of the United States. When a district court determines that a party does not fall within the protections of the Federal Tort Claims Act, as in this case, where an individual is found to have committed a common law tort not acting within the scope of his employment, there is no independent substantive basis for federal jurisdiction with the possible exception of removal jurisdiction under 28 U.S.C. §1442(a)(1). The issue of whether the defendants were acting "under color of" their federal employment has not been addressed by the district court and the record provides no basis upon which such a determination can reasonably be made. *Mesa, supra*, however, clearly states that removal jurisdiction under 28 U.S.C.§ 1442(a)(1) will only apply where there is a "federal defense" to the conduct alleged. *Mesa, supra*, at 109 U.S. 966. There is no federal defense available to the individual defendants in this case.

The panel's decision in this matter indicates that the district will be required to retain jurisdiction of this matter for trial based solely upon the certification of the Attorney General that the employees were, in fact, acting within the scope of

their employment at the time of the conduct alleged. As set forth in this court's decision in *Melo v. Hafer*, *supra*, and *Schrob v. Catterson*, *supra*, as well as decisions in the 1st Circuit, *Nasuti v. Scannell*, 906 F.2d 802, 7th Circuit, *Snodgrass v. Jones*, 957 F.2d 482 (7th Cir., 1992), 11th Circuit, *Green v. Hill*, 954 F.2d 694 (11th Cir., 1992), *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir., 1990), *cert. denied*, ___ U.S.___, 112 S.Ct. 62, 116 L.Ed.2d 37 (1991) and others, a determination that the scope certification providing the basis for removal from state court is erroneous will lead to a remand to the state court where the case was originally brought.

In *Nasuti*, *supra*, the First Circuit, in its conclusion to the opinion in that case stated: "If the district court finds that Scannell was acting *outside* the scope of his employment, it shall remand the case back to the state's superior court." 906 F.2d at 814 (emphasis in original). Likewise, in *Green*, *supra*, the 11th Circuit Court of Appeals stated, in the final paragraph of its opinion: " If the district court finds that the assault and battery occurred within the scope of Hill's employment, it must dismiss this case. If it finds that the acts occurred outside the scope of employment, it must remand the case to state court for the claim of assault and battery against Hill to proceed." 954 F.2d at 698, citing *S.J. & W. Ranch*, *supra*. Likewise, in footnote 20 to the *Melo* opinion, *supra*, this court stated clearly that, on remand, the district court *must* rule on the Plaintiff's Motion for Remand, 912 F.2d at 642, indicating that, contrary to the panel's opinion in this case, there is no place for a state law claim between two private citizens which does not implicate any law or interest or interest of the United States in federal court.

The judicial power of the federal courts is defined and circumscribed in Article III, Section 2 of the United States Constitution. A comparison of this case against the limitations set forth in that section of the Constitution indicates clearly that the jurisdiction of the federal courts shall not extend to a common law tort action between citizens of the same state. There is no provision in Article III, Section 2 which could be applied to this case if, on remand, the district court again concludes that the Defendants were not acting within the scope of their employment such as would permit the

district court to proceed with trial. Clearly, trial would be a hollow exercise in a court which did not have constitutional jurisdiction to enter a valid judgment.

The panel interprets 28 U.S.C. §2679(d)(2) to require the case to remain in federal court for trial even if the individual Defendants are properly found to have acted outside the scope of their employment. Since the Federal Tort Claims Act, 28 U.S.C. §2671(c), applies only to torts committed by federal employees "while in the scope and course of their employment," 28 U.S.C. § 2672, the F.T.C.A. does not provide a jurisdictional basis for the remaining action between Plaintiff and the individual Defendants who are found to have acted outside the scope of their employment.

In the scenario set forth above, the district court would not apply the F.T.C.A. pursuant to 28 U.S.C. §2679(d), the only arguable basis for federal court jurisdiction would be the last sentence of §2679(d)(2) which states: "The certification of the Attorney General shall be conclusive *for purposes of removal*" (emphasis added). The effect of this curious language has ben debated in many courts, as set forth above, and the interpretation given that language by the panel of this court has been specifically rejected by various circuit courts for the very reason that the application suggested in this case would constitute an obvious violation of the doctrine of separation of powers, and would unconstitutionally expand the jurisdiction of the Federal courts.

The 1st Circuit held in *Nasuti v. Scannell*, *supra*, "While Congress provided that the Attorney General's certification conclusively establishes scope of employment for *removal purposes*, we do not construe this as abolishing the district court's normal power to determine the scope question finally where necessary to resolve disputed rights and the court's own subject matter jurisdiction." 906 F.2d at 808 (emphasis in original). The First Circuit went on to say, "indeed, there might be separation of powers question if the statute were read to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the federal court." 906 F.2d at 813. The First Circuit found that while the "scope certification must be given conclusive effect for purposes of removal, that conclusive effect lasts only until the court

speaks on the specific scope issue." 906 F.2d at 813, fn.16. Likewise, the Eleventh Circuit in *S.J. & W. Ranch, Inc., supra*, stated: "[S]eparation of Powers concerns generally bar executive branch interference in the judicial branch's determination of its subject matter jurisdiction." citing *Nasuti, supra*, 906 F.2d at 813, and *Gogek v. Brown Univ.*, 729 F. Supp. 926 (D.R.I. 1990). *See also, Mesa, supra.*

The position of the United States in this matter is that the case should remain pending in the district court notwithstanding the lack of any substantive basis for federal court jurisdiction. This denies the Plaintiffs their choice of forum and, in particular, denies the Plaintiffs the benefits of the state court forum which, in this case, are numerous. Petitioners assert that this court can take judicial notice of the backlog of civil cases in the district courts of Pennsylvania as well as the reasons for that backlog which have been frequently been discussed in opinions of this court and others. This backlog will, if the district court is burdened with this case, delay plaintiffs in the resolution of this case. Further, under the Pennsylvania Rules of Civil Procedure, Plaintiffs are entitled with leave of court to engage in discovery prior to the filing of the complaint. In fact, it was specifically to take advantage of that procedure that procedure that Plaintiffs commenced this action in the state court by the issuance of a Writ of Summons. A reasonable inference is that the case was removed specifically in order to prevent investigation of Plaintiff's state law claim. This pre-filing discovery procedure is often utilized in cases where the factual basis and merit are difficult to determine since the opposing parties are not often forthcoming, and there does not exist an impartial investigation by a neutral investigator. This procedure allows a Plaintiff to institute an action without filing a complaint, investigate it for merit and for purposes of preparing a specifically factual complaint as required under the Pennsylvania Rules, or to determine that the case is without merit and dismiss it without proceeding further and without being required to put potentially damaging allegations on the record. Although some of these concerns are obviated by the application of the more liberal pleading rules under the Federal Rules of Civil Procedure, Plaintiffs at no time prior to the issuance of the writ

suspected that there was any ground for federal jurisdiction in this matter. Plaintiffs have still not been permitted to fully investigate this matter. Permitting the executive branch to place this matter into federal court based upon the arguably improper scope certification was calculated to and, will in fact deny Plaintiffs their choice of forum. Assuming that the district court finds that the scope certification was erroneous, the government still maintains, and the panel agreed, that the district court should be burdened with yet another case for trial, this one bearing the unique pedigree of being nothing more than a common law tort action between individual citizens of the same state.[1]

VI. CONCLUSION:

It is incumbent upon the Supreme Court to intercede pursuant to its supervisory authority to consider the Third Circuit's instant interpretation of a basic jurisdictional procedure under the Westfall Act that will permit complete executive branch discretion in establishing federal court jurisdiction. It is evident that other circuit courts have not provided that same unfettered discretion and the decision of the Supreme Court in *Mesa v. California, supra*, dictates that a removal statute is insufficient to support jurisdiction under Article III of the constitution where no federal defense is implicated. This is such a case where the Attorney General's certification is prospectively found to be in error. Moreover, if the panel decision of the Third Circuit remains unchallenged, the fundamental jurisdictional provisions of Article III, Section 2 of the Constitution will be compromised. The Petitioners

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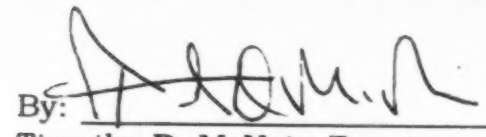
[1] It is undisputed and, the Government has admitted in pleadings that all of the individual defendants were citizens of the state of Pennsylvania at the time of the conduct complained of.

respectfully request this Honorable Court to maintain uniformity of decisions within the respective circuits and retain adherence to the clear mandate of *Mesa v. California, supra.*

Respectfully submitted,

VENDETTI, TALARICO & McNAIR



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